

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

KENNETH LEN THOMAS,

Defendant-Appellant.

---

UNPUBLISHED

February 28, 2006

No. 256301

Kalamazoo Circuit Court

LC No. 03-001046-FH

Before: Meter, P.J., Whitbeck, C.J. and Schuette, J.

PER CURIAM.

Defendant appeals by right his sentences of four to fifteen years in prison for his two jury convictions of criminal sexual conduct in the second degree, the victim being under thirteen years of age, MCL 750.520c(1)(a). We affirm defendant's convictions, but remand for resentencing only.<sup>1</sup> This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from accusations that he repeatedly engaged in sexual activity with his seven-year-old daughter during parental visitations at his home. Initially, defendant denied that anything had occurred, but later allegedly made incriminating statements.

On appeal, defendant challenges the scoring of Offense Variable (OV) 13. This variable is governed by MCL 777.43 which provides in pertinent part:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

\* \* \*

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person..... 25 points

---

<sup>1</sup> Defendant does not challenge the validity of his convictions of criminal sexual conduct in the second degree, but only raises issues concerning his sentencing.

\* \* \*

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant received a score of twenty-five points for this variable, over his objection, on the ground that he had engaged in three or more incidents of sexual activity with the victim. He argued that this variable should have been scored at zero points because he had been charged with only two instances of misconduct. Defense counsel acknowledged that the agent's description of the offense contained in the presentence investigation report (PSIR) contained an allegation that defendant had engaged in other acts with the victim, based on a protective services report. Defendant challenged the accuracy of the report and the underlying information. The prosecutor responded that defendant had been charged with only two counts because there were only two incidents that the victim could recall sufficiently to justify separate charges. The trial court asked the prosecutor whether she had access to the alleged protective services report and the prosecutor replied that she did not, but maintained that she had the initial police report, "as well as the videotape from her original FRC interview" in which the victim stated that similar incidents had occurred more than five times. The trial court upheld the scoring of OV thirteen at twenty-five points based on the PSIR's reference to the protective services report and the alleged videotape.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002); see also *People v Leversee*, 243 Mich App 337, 349; 622 NW2d 325 (2000). We will uphold a scoring decision when there is any evidence in the record to support it. *Hornsby, supra*.

Plaintiff relies on the agent's description of the offense contained in the PSIR and the premise that a PSIR is presumed to be accurate and reliable to argue that the scoring was proper. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). However, we have previously held that, depending on the nature of the disputed matter, a flat denial may be sufficient to mount an effective challenge to items in the PSIR. See *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003), citing *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987). A defendant is entitled to the use of accurate information during his sentencing, and a trial court must respond to a defendant's allegations that a presentence investigation report contains inaccuracies. *People v McAllister*, 241 Mich App 466, 473; 616 N.W.2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). We review the sentencing court's response to a defendant's claim of inaccuracies in his PSIR for an abuse of discretion, *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003), and review the trial court's factual findings at sentencing for clear error. MCR 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

After thoroughly reviewing the record presented, we agree with defendant that he is entitled to resentencing. Plaintiff has presented no record evidence to support this scoring decision. The victim alleged that defendant engaged in sexual conduct with her on more than

one occasion. However, she did not provide any indication whether this contact occurred more than twice. We have uncovered no statement that would support even an inference of other repeated acts. Nor has plaintiff provided us with any contrary reference that would support its position. Neither the police report, protective services report nor videotape were provided to this court or the trial court. Under the circumstances, we find the trial court's scoring decision concerning OV 13 clearly erroneous because the prosecutor failed to provide any evidence of other instances of misconduct. Defendant is entitled to resentencing. At the resentencing hearing the parties may submit evidence pertaining to OV 13 and the trial court is free to make appropriate fact findings.

Next, defendant argues that he must be resentenced because the trial court made essential findings regarding the nature of the offenses in its scoring decisions concerning OV 13, as well as OV 4 (psychological damage to a victim) and OV 10 (exploitation of a vulnerable victim). MCL 777.34 and MCL 777.40. Defendant argues that these findings should have been decided by a jury pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *Blakely, supra*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant.

We find defendant's arguments unpersuasive. Our Supreme Court has stated that the holding in *Blakely, supra*, does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).<sup>2</sup> Defendant is not entitled to relief on this basis.

We affirm defendant's convictions and remand for resentencing only. We do not retain jurisdiction.

/s/ Patrick M. Meter  
/s/ William C. Whitbeck  
/s/ Bill Schuette

---

<sup>2</sup> Our Supreme Court granted leave to appeal in *People v Drohan*, 264 Mich App 77; 689 NW2d 750 (2004); 693 NW2d 823 (2005), "limited to the issue whether *Blakely, supra*, and *United States v Booker*, 543 US; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme." 472 Mich 881; 693 NW2d 823 (2004). However, at present, *Claypool, supra*, is controlling.